

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 22
3033037

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| BETWEEN | A LABOUR INSPECTOR Applicant |
| AND | HUICHAN XU trading as GOLDEN SPRING TAKEAWAY Respondent |

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| Member of Authority: | James Crichton |
| Representatives: | Clare English, counsel for the Applicant Scott Jefferson, counsel for the Respondent |
| Investigation Meeting: | On the papers |
| Submissions [and further Information] Received: | 13 November 2018 and 20 December 2018 from the Applicant 17 December 2018 from the Respondent |
| Date of Determination: | 18 January 2019 |

Employment Relationship Problem

[1] The applicant, a Labour Inspector, alleges that the respondent (Golden Spring Takeaway) breached minimum code provisions in respect to two employees being Mr Chijia Lin and Mr Xi Lin Lyu, in that Golden Spring Takeaway failed to retain copies of the employees' individual employment agreements, failed to keep a wage and time record, failed to pay the employees at least time and a half for working on a public holiday, failed to provide the employees with an alternative holiday for work done on a public holiday, and failed to keep holiday and leave records as required by law.

[2] The Labour Inspector seeks to recover penalties for those failures. Golden Spring Takeaway has eventually accepted the breaches thus avoiding the necessity for a hearing and enabling this matter to be dealt with on the papers.

The Issues

[3] The question for the Authority is the quantum of penalty to impose in respect to the various breaches of the law by Golden Spring Takeaway.

Background Facts

[4] Golden Spring Takeaway was a Napier restaurant and takeaway serving Chinese food. It was operated as a sole trader by Ms Zu. Ms Zu has been in business for a number of years but according to the submissions I have received on her behalf, the business has recently been leased to another party. However, it is common ground that at the relevant time, Ms Xu was the employer of the two subject employees.

[5] Despite now accepting the breaches, Ms Zu was unco-operative in the Inspector's investigations.

[6] In August 2017, Golden Spring Takeaway was visited both by Immigration Services and the Inspector. The Inspector's interest focussed particularly on the two subject employees who were observed working in the kitchen.

[7] The Inspector took written statements from the two subject employees on 9 August 2017. Those statements confirmed that both men worked seven days a week, had done so since late 2016 and were accommodated in the restaurant premises. The Inspector formed the view that both these men were vulnerable migrants.

[8] In contemporaneous discussions between the Inspector and Ms Xu, the latter contended first that she maintained good records of all the employees and second that Mr Chijia Lin and Mr Zi Lin Lyu were not her employees.

[9] The records provided by Ms Xu to the Inspector were incomplete both in respect to the employees they did cover and to the extent that they did not cover all individuals in the business who appeared to be employees.

[10] In a further discussion between the Inspector and Ms Xu on 21 December 2017, the employer admitted that she did not maintain any records for the employees aged under 16 and continued to contend that the two subject employees were neither of them employees of hers.

[11] On 21 March 2018, further records were provided by the employer to the Inspector but they were effectively manufactured records developed after the fact rather than contemporaneous original source records.

[12] Because of the absence of proper source records, and Ms Xu's practice of paying staff in cash, the Inspector was unable to accurately calculate the entitlements of the subject employees.

[13] The Inspector then brought these proceedings in the Authority alleging ten separate breaches as follows:

- (a) Two failures to retain a copy of the employees' individual employment agreement in breach of s 64 of the Employment Relations Act 2000 (the Act); and
- (b) Two failures to keep a wage and time record in breach of s 130 of the Act; and
- (c) Two failures to pay employees at least time and a half for working on a public holiday in breach of s 50 of the Holidays Act 2003; and
- (d) Two failures to provide employees with an alternative holiday for work done on a public holiday, in breach of s 56 of the 2003 Act; and
- (e) Two failures to keep a holiday and leave record, in breach of s 81 of the 2003 Act.

[14] On 29 July 2018, Ms Xu caused a statement in reply to be filed in the Authority in which she admitted for the first time that the subject employees were her employees. She further admitted all of the breaches identified by the Inspector.

[15] It followed that a hearing was not required and the parties agreed that the matter could be dealt with on the papers.

Penalty Action

[16] The Inspector submits that this is a case where the Authority ought to impose penalties in respect to the breaches of the minimum code and that submission activates the

rules set out by the full bench of the Employment Court in *Borsboom v Preet Pvt Limited (Preet)*¹.

[17] The principles enunciated in *Preet* are applied here. I follow the four step approach set out by the Court in *Preet*.²

Step One: Nature of Breaches; Number of Breaches; Maximum penalty available

[18] It is common ground that there are five different types of breaches that have been committed by the respondent. These are:

- (a) A breach of s 64 of the 2000 Act in a failure to retain a copy of the employee's individual agreement;; and
- (b) A breach of s 130 of the 2000 Act in a failure to keep a wage and time record; and
- (c) A breach of s 50 of the Holidays Act 2003 in that the employee was not paid at least time and a half for working on a public holiday; and
- (d) A breach of s 56 of the 2003 Act in that the employer did not provide the employees with an alternative holiday for work done on a public holiday; and
- (e) A breach of s 81 of the 2003 Act in that the employer did not keep a compliant holiday and leave record.

[19] There are accordingly a total of ten breaches because each of the five different kinds of breach referred to in the previous paragraph each affect two employees.

[20] The maximum penalty available for breaches of the 2003 Act is \$10,000; similarly, relevant breaches of the 2000 Act in this circumstance attract a like penalty of \$10,000.

[21] Given that there are two subject employees identified in respect to each breach it follows that the maximum penalties available in respect of each identified breach is \$20,000 so the maximum total penalties available is \$100,000.

[22] Submissions for both parties proceed on the footing that globalisation of penalties is not appropriate because breaches of two separate statutes are involved.

¹ *Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discounted Tobacco Limited* [2016] NZEmpC 143.

² [2016] NZEmpC 143 at [151].

[23] I accept for this and other reasons of principle, globalisation is not appropriate in this case.

Step Two: The severity of the breaches

[24] There is some consensus between counsel as to the starting point for this analysis and for the avoidance of doubt I accept the analysis proposed for the applicant. The effect of this is that the starting point for the failure to keep wage and time records, the failure to provide individual employment agreements, and the failure to keep holiday and leave records is 50%. The other two breaches would have a correct starting point of 70%.

[25] I consider that the submissions made for the applicant correctly state the law; *Preet* and other decided cases confirm those percentages. In respect to the 70% starting point for the failure to properly pay for work done on public holidays or to provide alternative holidays, I accept the contention made for the applicant that these breaches were especially egregious; the subject employees worked seven days a week and the consequence of that impacts both negatively on the employees and provides a significant unjustified financial advantage to Golden Spring Takeaway as well.

[26] While the Inspector identified aggravating factors, Golden Spring Takeaway suggests mitigating factors. I will refer to each in turn. The aggravating factors identified by the Inspector are as follows:

- (a) These subject employees were exploited. As migrant workers, they were treated differently from other workers and especially, were required to work long hours for seven days a week; and
- (b) The subject workers had no family in New Zealand and were especially vulnerable by reason of being migrant workers because they had an unfamiliarity with New Zealand laws and regulations and because they were working long hours seven days a week were unable to seek advice; and
- (c) The employees were not able to obtain long-term visas to remain in New Zealand; and
- (d) The employer's business was profitable and that profit was enhanced by the advantage Ms Xu took of the subject employees; and

- (e) Ms Xu had been trading in this country for some five years and so knew or ought to have known what the legal requirements were; and
- (f) Ms Xu failed to provide the Inspector with proper comprehensive and accurate information about the nature of the records kept; and
- (g) Ms Xu engaged with the Inspector over some ten months and provided the Inspector with inaccurate information about the breaches until the subject employees returned to China.

[27] Golden Spring Takeaway say in mitigation:

- (i) Despite operating the business for five years, there is no evidence of previous breaches; and
- (ii) Although it took some time for Ms Xu to acknowledge the wrongdoing, she eventually did thus avoided the necessity of a hearing (a submission acknowledged also by the Inspector); and
- (iii) The subject employees had left the jurisdiction before Ms Xu was able to remedy her defaults (but arguably, that is because Ms Xu did not accept her wrongdoing immediately); and
- (iv) The period of employment was short term (six months); and
- (v) Ms Xu was undergoing some difficult personal circumstances during the relevant period having suffered domestic violence from a former partner followed by an acrimonious separation and subsequent unpleasant engagements with the former partner.

[28] The Inspector submits that taking those factors into account, a reduction of 10% is warranted principally to take account of the eventual acknowledgement of wrongdoing when the statement in reply was filed. I am not persuaded this is appropriate. In my view, no discount is appropriate in that regard because it was available to Ms Xu to accept the breaches for fully ten months while she was denying them in engagements with the Inspector, and had she accepted the wrongdoing promptly, the matter might have been able to be addressed directly with the subject employees before they left the jurisdiction, and the proceedings brought by the Inspector might have been avoided or taken a different course.

[29] However, what does encourage me to a reduction in the starting point is the intimation that Ms Xu suffered some distressing personal circumstances during the relevant period. I am satisfied that that is an appropriate matter to take into account as it seems to me axiomatic that a woman in that distressing position could easily lose track, at least to some extent, of her other obligations. I am satisfied that a reduction of 20% is warranted because of this factor alone.

Step Three: Financial Circumstances of Respondent

[30] It seems that Ms Xu has relinquished the business for a period at least in part because of the distressing personal circumstances I referred to in the previous paragraph.

[31] Moreover, the submissions for Golden Spring Takeaway provide some indication of the financial circumstances of the Golden Spring Takeaway business.

[32] However, I accept the caution suggested to me by submissions for the Inspector about the completeness of that material. Given the intimation that the subject employees were paid in cash and that other staff were apparently paid from the till takings, it would seem that the financial position of the business may well be somewhat different from that portrayed.

[33] If wages are paid from the till without being properly processed through the books of account for the business, that creates a potentially false result which encourages the caution suggested by the employer.

[34] That said, the Inspector proposes that I adopt a reduction of 20% to take account of the fact that Golden Spring Takeaway is a small business and I accept that that reduction is appropriate.

[35] I also note for the sake of completeness that Ms Xu in her submissions maintains that she is unable to pay a lump sum penalty.

Step Four: Proportionality of Outcome

[36] The Inspector accepts that the application of the proportionality test will lead to a reduction in penalties applied. This is because the effect of not globalising penalties has the effect of creating an inflationary aspect to the totality of the penalties applied and that problem is exacerbated either with a large number of breaches (as in this case) or indeed a large number of employees.

Conclusion

[37] The starting point for the imposition of these penalties is \$100,000 being the totality of the potential maximum penalties for each of the breaches. That figure is reduced to \$58,000 by the application of the percentages in addressing the aggravating factors or their converse.

[38] I reduce that figure further by 20% to take account of the ameliorating factors and that produces a subtotal of \$46,400. Then that figure is again reduced by another \$20,000 to take account of the respondent's financial circumstances which gives a figure of \$37,120.

[39] To address the proportionality test I reduce that amount by rounding it down to \$30,000 and direct that Golden Spring Takeaway (Ms Xu) is to pay to the Labour Inspector at the Ministry of Business Innovation and Employment's trust account the sum of \$30,000 within 28 days of the date of this determination.

[40] I am not minded to order payment by instalments and direct that the parties counsel are to agree on any such arrangement. Leave is reserved for the parties to revert to me to fix an instalment basis if that is necessary.

[41] Ms Xu is also to pay to the Inspector the sum of \$71.56 being the Authority filing fee.

Costs

[42] There is no application before the Authority for costs to be fixed. Either party may file and serve a memorandum seeking the Authority fix costs.

[43] The responding party will have fourteen days from the date of the receipt of the initiating memorandum to file and serve their response. I will then determine costs on the papers.

James Crichton
Chief of the Employment Relations Authority